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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 354

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, and TERENCE P. O'ROURKE,
Petitioners,
vs.
UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO REVIEW A JUDGMENT AFFIRMING A VERDICT AND SENTENCE OF THE UNITED STATES DISTRICT COURT, AT MIAMI, FLORIDA.

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The opinion of appellate court (R. 272-276) is reported at 150 F. 2nd 82. The opinion of the trial court overruling

petitioners' demurrers to the indictment appears at pages 12-17 of the record, and is reported in 55 Fed. Supp. 372.

JURISDICTION

The judgment of the circuit court of appeals was entered June 14, 1945 (R. 277); petition for rehearing (R. 278-287), was denied July 18, 1945 (R. 289). Writ of certiorari was granted by this Honorable Court on October 15, 1945. The jurisdiction of this Court is invoked under Section 241 of the Judicial Code (Sec. 147, Title 28 U.S. Code). See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court May 7, 1913, and Acts of June 7, 1934, Ch. 426, 48 Stat. 926.

The jurisdiction of this Court is invoked on the following grounds:

a. This case is the first of its kind to be tried in a District Court and appealed to a Circuit Court of Appeals since the enactment of the Interstate Commerce Act in 1887, but there are pending and undisposed of in the District Courts throughout the country many cases involving the same offense.

b. There is pending before the Committee on Interstate and Foreign Commerce, H. R. 3747, wherein it is sought to have the Congress enact a law covering and punishing the offenses for which the defendants were convicted under the present Interstate Commerce Act.

c. The appellate court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

d. The appellate court in this instance has decided a federal question in a way probably in conflict with decisions of this Court, in that the statutes under which the defendants were tried are so vague, indefinite and insufficient as not to cover the facts, whereas this Court has said "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." **United States v. Lacher**, 134 U. S. 624, 628.

STATEMENT OF THE CASE

Petitioners Howitt and Dunhurst, ticket sellers of the Florida East Coast Railway Company, and appellant Lee, diagram clerk for the railroad, all located in Miami, Florida, were indicted for conspiracy to violate the Interstate Commerce Act (49 U.S.C.A. Secs. 1, et seq.) by agreeing together and with other persons unknown to commit the following offenses against the United States:

A. That they would collect and receive unjust and unreasonable charges for services rendered and to be rendered in the transportation of passengers in violation of Section 1 of the Interstate Commerce Act (the indictment is based on Sec. 1, 65 A, Title 49 U.S.C.).

B. That they would collect and receive from certain persons a greater compensation for services rendered in the transportation of passengers than they would collect and receive from other persons for doing for such other persons a like and contemporaneous service in the transportation of a like kind of traffic, in violation of Section 2 of the Act (Sec. 2, Title 49, U.S.C.).

C. That they would unlawfully make and give undue preferences or advantages to particular persons and would subject particular persons to undue prejudice and disadvantage in violation of Section 3 of the Act. (Sec. 3, Title 49, U.S.C.).

D. That they would collect and receive a greater and different compensation for transportation of passengers from Miami to other points without the State of Florida than the rates, fares and charges specified in tariffs filed with the Interstate Commerce Commission, in violation of Section 6 of the Act (Sec. 6, Title 49, U.S.C.).

The matters set forth in the above designated paragraph (D) are not a violation of Section 6, but are covered by Section 7, Title 49, U.S. Code. The indictment is contained in the record, pages 1 to 8.

Appellant O'Rourke, a ticket seller for the same carrier in Miami, was charged in a ten-count indictment with committing substantive offenses in violation of the Act in substantially the same manner as alleged in the conspiracy charge. The indictments were consolidated and tried together. A demurrer to the conspiracy count is contained on page 9 of the record and as to O'Rourke, on page 50 of the record. The demurrer was overruled (R. 55); the motion for directed verdict was denied (R. 239); exceptions were made to the charges of the court (R. 257).

The Government requested (Supp. R. 1) and the court gave the charge as requested (R. 251); During the entire trial the question was raised by the defendants in the lower court that the receipt of tips, gratuities or

bribes by the defendants did not constitute a crime under the Interstate Commerce Act, where the evidence disclosed that the passengers paid the proper tariff rate which in turn was handed over to the transportation and Pullman companies, and the only money retained by the ticket sellers were the tips and gratuities; or bribes. The gist of the case is contained in the court's charge (R. 251) which is quoted:

> "In the conspiracy case there are four different sections of the Interstate Commerce Act involved; first, by the collection and receipt of unreasonable and unjust charges for service rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for service than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons, and, fourth, by the collection and receipt of greater compensation for service than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device, is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation

> of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission".

The Government requested (p. 5, Supp. R.) two charges, which were consolidated by the court and given as follows:

> "Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor. The regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charges which may be made. Passenger accommodations should be equally available to the general public."

That the money received by the ticket sellers was in the form of tips is evidenced by the testimony of David Curry (R. 125, 128, 137); Elliott Elkin (R. 141, 142, 147); Albert Deverich (R. 156); Morris Jack Goldberg (R. 158, 160, 161); Louis W. Banach (R. 166); David Bieler (R. 181); Zach Johnson (R. 196, 200); Eula S. Ohler (R. 201, 205); and Joel Weiss (R. 222).

The petitioners also contended, by demurrer, motion for directed verdict, and exceptions to charges, that the

statutes under which they were tried are so vague, indefinite and insufficient as not to justify a judgment against them, upon the theory that "laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid".

The O'Rourke indictment contains ten counts (R. 30, etc.) and he was convicted on all but the fifth and sixth counts. The conspiracy defendants were sentenced to a year and a day imprisonment and to a fine of $1,000 (R. 63-66); O'Rourke was sentenced to concurrent terms of imprisonment for eighteen months and to pay a fine of $1,000 (R. 67-68). The odd-numbered counts of the O'Rourke indictment respectively charge a violation of Title 49, U.S. Code 2, 10, whereas the language of the indictment imports that it is based upon Section 6, subparagraph 7, Title 49, U.S. Code. The even-numbered counts of the O'Rourke indictment allege violation of Title 49, U.S. Code 6, sub-section 7. From a strictly legal standpoint, both the odd- and even-numbered counts constitute, if they charge any offense, a violation of said Section 6, sub-section 7. This becomes important in the O'Rourke case, because under Section 10 of the Act, O'Rourke was only subject to a fine, and the court had no authority to impose a jail sentence because O'Rourke did not come within the provisions of Section 10, which covers "unlawful discriminations in rates, fares or charges". In the petition for re-hearing, filed in the appellate court, this matter was called to the attention of appellate court and is contained on pages 2 and 3 thereof.

THE STATUTES UPON WHICH INDICTMENTS WERE BASED, AND CO-RELATED STATUTES, ARE SET FORTH IN APPENDIX TO THIS BRIEF.

SPECIFICATIONS OF ERROR

Are ticket sellers of a railroad corporation involved in interstate commerce passenger transportation amenable under the provisions of the Interstate Commerce Act for accepting tips, gratuities or bribes from passengers in addition to the legal tariff rate when they hand over such legal tariff rate to their employer and simply retain the tips? This question is based upon the following assignments of error (R. 95) urged in the appellate court:

(a) overruling of demurrer; (b) denying motion for directed verdict; and (c) charging the jury.

ARGUMENT

The demurrers to the indictment as well as the motion for a directed verdict were argued upon two theories:

(a) That the Interstate Commerce Act, the aim of which was the prevention of discrimination by carriers, did not create any offense against other than carriers except where the carrier was the principal offender and the individuals aided and abetted; and

(b) That the Interstate Commerce Act did not create a crime covering the acts committed by the defendants in the acceptance of tips or gratuities, or bribes.

Under the theory denominated as (a), it was argued in the lower court that unless the railroad received the benefit of the overcharge, the ticket agent could not be prosecuted, because the agent in accepting the tips or

bribes was a trespasser, embezzler, or a violator of state law, and his offense did not come within the purview of the Interstate Commerce Act."

This question was passed upon by two district court judges in cases where the facts disclose that the money received by the agent was less than the amount of the legal tariff rate, and the money was embezzled by the agent. In the first of these cases, **U.S. v. Petersen**, 1 Fed. 2nd 1018 (Montana) decided October 6, 1924, opinion by District Judge Bourbon, it was held:

> "It follows that, unless there is a common carrier guilty as principal, the carrier's employees or other persons cannot be guilty as aiders, abettors, accomplices, or accessories, not even as offenders by the agency of an innocent principal; and that, because they are not of the class that alone can commit the offenses by the statutes denounced, viz. common carriers who wilfully discriminate, and those persons who aid or abet them therein. The fact that the defendant was 'employed by' the carrier is not enough; for, taking the statutes as a whole, it seems clear their intent is to include the employee only when 'acting' within the scope of his employment' and, thereby imposing equal guilt upon the carrier. This defendant, for the nonce abandoned his employment, acted without his employment, in trespass against his employer, and for his own benefit. His acts attach no criminality to the carrier, and, without it guilty as principal, he is not guilty, for reasons aforesaid."

The second case is that of **U.S. v. Estes**, 6 Fed. 2nd 902 (Illinois), opinion by District Judge Fitzhenry. This case was decided April 4, 1924, six months before the decision in the Petersen case. The opinion in the case states:

> "It is argued that, while the line of conduct charged in the indictment in this case might have amounted to fraud or graft, still it did not amount to a violation of Section 10".

The case involved the sale by Pullman conductors of tickets and Pullman accommodations at less than the legal rate. There is no doubt that all the money so received was retained by the agents and none was turned over to the railroad. District Judge Fitzhenry held in his opinion that the offense came within the terms of the Interstate Commerce Act.

However, neither of said cited cases is factually similar to the case at bar, where the railroad and the Pullman company received the lawful tariff rate and where the defendants retained only a tip, gratuity or, at the very worst, a bribe.

The Government relied upon and the appellate court cited with approval **U.S. v. Tozer**, 37 Fed. 637, where a demurrer to a similar indictment was overruled on the ground that:

> "When an agent of a railroad is prosecuted under the statute for an unlawful act, it is not necessary * * * either to allege or prove that the particular unlawful act complained of was done

under authority conferred by a principal or by its direction".

The appellate court states that the Tozer case was approved by Judge Taft in **Toledo v. Pennsylvania Railroad Co.**, 54 Fed. 730, and also cites the decision of the United States Supreme Court in **Union Pacific Railway Co. v. U. S.**, 313 U.S. 450, where it is stated that action by any person to bring about discrimination in respect to the transportation of property is made unlawful by the Elkins Act.

In the Tozer case, the defendant was an agent of the Missouri Pacific Railroad and as such he charged Haywood Grocery Company a greater rate for sugar shipments from Hannibal, Missouri to Halper, Kansas, than he charged the Chicago, Burlington & Quincy Railroad for similar service. Factually Tozer received the freight money and turned it over to the Missouri Pacific Railroad. Judge Thayer in his opinion states that Section 10 of Interstate Commerce Act renders any agent of a railroad company that is subject to the provisions of the Act amenable to the penalties set forth herein if he either alone or with any one person or corporation wilfully does any of the acts prohibited, and he further sets forth that it is unnecessary to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal or by its direction. This Tozer case later came on for trial, and is reported in 39 Fed. 369, and from the court's charges it appears that the railroad company, the carrier company, received the excess rate. Therefore the Tozer case as cited by our appellate court is not a precedent to be followed in the case at bar.

It is interesting to observe however that this Tozer case was appealed to the United States Circuit Court 152 Fed. 917 and that court, through Mr. Justice Brewer, reversed the judgment upon the following theory:

> "but, in order to constitute a crime, the act must be one which a body is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Co. v. Day, 35 Fed. Rep. 866, 877, I had occasion to discuss this matter, and I quote therefrom as follows:
>
> 'Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what any jury will find to be a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainants criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary man can determine in advance what he may or what he may not do under it.'"

We cite the opinion of Mr. Justice Brewer because it accords with Ground 5 of the demurrer, to-wit: the statutes upon which the indictment is based and related

statutes covering transportation in inter-state commerce do not bring within the statutes the acts set forth in the indictment, and "laws which create crime ought to be so explicit that all men subject to their penalty may know what to avoid, and before a man can be punished his case must be plainly and unmistakably within the statute." p. 100.

Mr. Justice Brewer who wrote the opinion of the Circuit Court of Appeals in the last cited case, was commissioned an Associate Justice of the United States Supreme Court in December, 1889.

The Tozer case, as reversed by Judge Brewer, applies to the case at bar, in that the charge of the trial Judge, which is again repeated, submits to the jury the reasonableness or otherwise of the tips received, viz:

> "The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device, is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for service than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collec-

tion and receipt of greater compensation for services, than the rates specified in the tariffs filed with the Interstate Commerce Commission."

Our argument that the Interstate Commerce Act does not create a crime covering the acts committed by the defendants in the acceptance of tips, gratuities, or bribes is based upon the language used in the case of **U.S. v. Brewer**, 139 U.S. 278; 11 S. Ct. 538; 35 L. Ed. 190; wherein the court said:

> "It does not suffice that defendant's case may be within the mischief of the statute, for, not clearly within their letter, it is not within their intent. 'Laws which create crime ought to be so explicit that all men subject to their penalties may know what [illegible] to avoid', and before a man can be punished, his case must be plainly and unmistakably within the statute'".

An examination of Shepard's Annotations discloses that the Tozer case is referred to in the following opinions of the United States Supreme Court: **Waters Pierce Oil Co. v. State of Texas**, 212 U.S. 109; 53 Law Ed. 417; 29 Sup. Ct. 226, wherein the court says:

> "Among others, Tozer v. U.S., 4 Inters. Comm. Rep. 245, 52 Fed. 917; is cited, in which the opinion was by Mr. Justice Brewer, then Judge of Circuit Court, in which it was held that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable."

"To the same effect in Chicago & N.W. R.R. v. Dey, 1 L.R.A., 744, 2 Inters. Comm. Rep. 335, 35 Fed. 866, also decided by Judge Brewer at Circuit, and also the case of Louisville & N.R. Co. v. Com. 99, Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S.W. 129, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate and in which it was held that the law was unconstitutional, because it rests with the jury to say whether a rate is reasonable and makes guilt depend not upon standards fixed by law but upon what a jury might think as to the reasonableness of the rate in controversy."

The court however pointed out that the statute does not give this broad power to the court or jury.

The next case is that of **Nash** v. **U.S.**, 229 U.S. 373, 57 L. Ed. 1232, 33 Sup. Ct. 781. This case concerned a violation of the Sherman Anti-trust Act and was reversed by the United States Supreme Court. On Page 377, 229 U.S., the court said:

"and thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty'

and cited from the late Mr. Justice Brewer sitting in the Circuit Court, **Tozer v. U.S.** 1 Inters. Comm. Rep. 245, 52 Fed. 917, 919.

The next case is that of **U.S.A. v. Cohen Grocery Co.** 255 U.S. 81, Text 92; 65 L. Ed. Text 522; 41 Sup. Ct. Text 301. This case involved a violation of the Lever Act as re-enacted in 1919 wherein it was provided:

> "that it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries to conspire, combine, agree or arrange with any one person * * * to exact excessive prices for any necessaries".

The defendant demurred to the indictment and the lower court sustained the demurrer. The Supreme Court quoted the following language from an opinion previously expressed by the lower court in charging a jury, wherein the court said:

> "Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. Therefore, because the law is vague, indefinite and uncertain, and because it contains no immutable standard of guilt but leaves such standard to the variant powers of different courts and juries which will be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid and that the

demurrer offered by the defendant ought to be sustained".

The Supreme Court then recites the portion of the Lever Act above quoted and as to the certainty or uncertainty of the text, constituting a fixing by Congress of an ascertainable standard of guilt adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. The court said:

> "That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against."

The Supreme Court, after holding that the lower court acted correctly in sustaining the demurrer, said:

> "And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution. That it results from the consideration

> which we have stated that the section before us was void, for repugnancy to the Constitution, is not open to question"

and thereupon, the United States Supreme Court, after citing other decisions, cites with approval the decision in **Tozer v. U.S. Inters. Comm.** Rep. 245, 919, 920.

The next case is **Cline v. Frink Dairy Co.**, 274 U.S. Text 455, 71 L. Ed. Text 1151, 47 Sup. Ct. Text 684. This case involved an appeal by defendant from the decree of the District Court of Colorado enjoining proceedings to enforce an anti-trust act, and was reversed in part. Mr. Justice Taft in the course of the opinion, cited the opinion of the Supreme Court in the Cohen Case, supra, and the court refers, with approval, to a number of cases including **Tozer v. U.S.**, 52 Fed. 917, 919, 920. The court in the opinion said:

> "We are now considering a case of state legislation and threatened prosecutions in the state court where only the 14th Amendment applies, but that requires that there should be due process of law and this certainly imposes upon a state an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required".

CONSTRUCTION OF INTERSTATE COMMERCE ACT

We contend that the Interstate Commerce Act lacks any provision upon which an indictment could be based

in respect to the matters involved in the present controversy. Had the Congress in drafting the Interstate Commerce Act, defined offenses relating to passenger transportation with the same definiteness, particularity, and cosequent penalties, as it did concerning property transportation, there would be no need to burden this Court with any argument. However, when it came to the attention of the Interstate Commerce Commission that employees of railroad companies were accepting gifts, gratuities and bribes for the purpose of influencing the decision of the employees with respect to the supply, distribution or movement of cars or other vehicles or vessels used IN THE TRANSPORTATION OF PROPERTY (emphasis supplied), that body solicited the Congress to enact legislation to curb such evil, and thereupon Sub-section 17 (a), of Section 1, of Title 49 was enacted, which section is set forth on Page xii of the Appendix.

In 1889, when it came to the attention of the Interstate Commerce Commission and the Congress that shippers were paying money or other thing of value to induce carriers or agents to discriminate in regard to SHIPPING OF PROPERTY, the Congress enacted what is now Section 10, Paragraph 4 which is contained in the Appendix on Page viii, wherein any person who, by the payment of money or other thing of value, solicitation, or otherwise, induces a common carrier or its agents to discriminate unjustly in favor of one part as against any other consignor in the transportation of property, shall be subject to a fine or imprisonment.

In 1889, in regard to false billing as now contained in Paragraph 2 of Section 10, the Congress enacted:

> "Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing . . . ."

shall permit property to be transported at less than the regular rates shall be guilty of a misdemeanor.

The last two amendments to the Interstate Commerce Act were made within two years after the enactment of the original Act, but the amendments solely dealt with the transportation of property.

There is now pending before the Committee on Interstate and Foreign Commerce, H.R. 3747, wherein it is sought to have the Congress enact a law covering and punishing the offenses for which the defendants were convicted under the present Interstate Commerce Act. That proposed statute is on Page xiv of the Appendix.

JUDGMENT OF IMPRISONMENT AS TO O'ROURKE

Section 2 of the Interstate Commerce Act is set forth in Appendix Page iii. It punishes a common carrier who directly or indirectly by any special rate, rebate, drawback or other device, charges, demands, collects or receives from any person a greater or less compensation for services in the transportation of passengers or property, than it charges other persons for doing a like and contemporaneous service. The section emphatically states:

"Such common carrier shall be deemed guilty of

unjust discrimination, which is prohibited and declared to be unlawful".

A reading of the O'Rourke indictment is convincing to the effect that he was charged with receiving a larger sum of money for transportation of passengers than was set forth in the tariff schedule (sub-section 1 of Section 6). O'Rourke received a penetentiary sentence and under the first paragraph of Section 10 of the Interstate Commerce Act, it is contended that his acts, if violative of the statute, rendered him guilty of a misdemeanor, and subject to a fine of not more than $5,000. O'Rourke did not come within the proviso of Section 10, which reads:

> "Provided, that if the offense for which any person shall be convicted, as aforesaid shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penetentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The only relevant portion of the Interstate Commerce Act which uses language similar to the language contained in the above proviso, is Section 2 where it is set forth that the commission of the acts therein described constitute "unjust discrimination".

In the Estes case, supra, the court stated that the defendants were guilty of a misdemeanor, and the records

of the United States District Court disclose that a small fine was imposed. This leads to the conclusion that the trial court in that case, passed its sentence upon a construction of the law dealing solely with persons selling tickets at a greater or less price than set forth in the tariff schedule.

It is respectfully urged that the judgment of the appellate and trial court should be reversed.

Respectfully,

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APPENDIX

STATUTES CITED AND INVOLVED
NATIONAL TRANSPORTATION POLICY

(49 U. S. Code Sec. 1, et seq.)

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act by inserting before part I thereof (chapter 1 of this title) a provision entitled "National Transportation Policy" which reads in part:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8 and 12 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices, etc."

And in subdivision (4) of Section 1, the following duties are set forth:

> "(4) Duty to furnish transportation and establish through routes; division of joint rates. It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and

to establish reasonable through routes with other such carriers; and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto."

AND

"(5) Just and reasonable charges required; classification of messages, and rates; exchange of services.

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

The pleader charges in the conspiracy indictment that the offending acts were committed contrary to

a. Sec. 1 of the Interstate Commerce Act

b. Sec. 2 of the Interstate Commerce Act

c. Sec. 3 of the Interstate Commerce Act

d. Sec. 4 of the Interstate Commerce Act.

Sec. 1, 5), (a), is quoted above, and the remaining sections involved are:

Section 2:

"Special rates and rebates prohibited.

If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback, or other device, **charge, demand, collect, or receive** from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, ch. 104, part 1, § 2, 24 Stat. 379; Feb. 28, 1920, ch. 91, § 404, 41 Stat. 479; June 19, 1934, ch. 652, § 602 (b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.) (Underscoring supplied.)

Section 3:

"Preferences; interchange of traffic; terminal facilities.

(1) Undue preferences or prejudices prohibited. It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; PROVIDED, HOWEVER, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 6:

"Schedules and statements of rates, etc., joint rail and water transportation—(1) Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the

route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

The charge in the conspiracy indictment wherein it alleges a violation of Sec. 6, must particularly pertain to

Sub-section 7 of Section 6 which provides:

"Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The O'Rourke indictment (odd numbered counts) are based on alleged violations of Title 49, U.S.C. Sec. 2, and Sec. 10:

Sec. 2 is quoted heretofore and Section 10 follows:

"Violations of regulations by carrier; discrimina-

tion; penalties—(1) Violation by carrier or officer; penalty.

Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense; PROVIDED, that if the offense for which any person shall be convicted, as aforesaid shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore

provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The even numbered counts in O'Rourke indictment cover violation of Sub-Section 7 of Section 6, which is heretofore quoted.

We have quoted the first paragraph of Section 10 but it has three additional sub-sections, which refer specifically to false billing as to freight shipments; obtaining lower rates by false billing or false claim; and inducing unjust discrimination as against other consignors or consignees, solely in regard to freight, and the latter (sub-section 4 of Section 10) reads:

"Inducing unjust discrimination; penalty; liability for damages.

If any such person or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon convic-

tion thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine not exceeding $5,000 or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom." Feb. 4, 1887, ch. 104, part I, § 10, 24 Stat. 382; Mar. 2, 1889, ch. 382, § 2, 25 Stat. 857; June 18, 1910, ch. 309 § 10, 36 Stat. 549; Feb. 28, 1920, ch. 91, § 414, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543."

Because reference is made in the argument to certain sections of Chap. 2, the following is quoted therefrom:

"Chapter 2. — LEGISLATION SUPPLEMENTARY TO "INTERSTATE COMMERCE ACT"

§ 11. Liability of corporation carriers and agents; offenses and penalties. (1) Liability of corporation common carriers; offenses; penalties, jurisdiction.

Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any re-

ceiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall,

be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: **Provided,** That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) Liabilities for acts of agents; departure from published rates.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every

case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of Chap. 1 of this title, or participates in any rate so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under Sec. 41, 42 or 43 of this title, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section."

Title 49, Sec. 1, Sub-section (17), (b), (enacted in 1940), reads:

"It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to any person acting for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced

thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property."

In regard to transportation of property, Sub-section 4, of Section 10, is as follows:

"Inducing unjust discrimination; penalty; liability for damages.

If any such person or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine not exceeding $5,000 or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common

carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (Feb. 4, 1887, ch. 104, part I, § 10, 24 Stat. 382; Mar. 2, 1889, ch. 382, § 2, 25 Stat. 857; June 18, 1910, ch. 309, § 10, 36 Stat. 549; Feb. 28, 1920, ch. 91, § 414, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543)."

The following excerpt is from H.R. 3717:

IN THE HOUSE OF REPRESENTATIVES
July 10, 1945

Mr. Lea introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce:

A BILL

To amend the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph 17 of section 1 of the Interstate Commerce Act, as amended, be amended by adding after subparagraph (b) thereof the following:

"(c) It shall be unlawful for any person acting for or employed by any common carrier sub-

ject to this Act to demand, solicit, or receive, directly or indirectly, any bribe, or any money, property, thing of value or gratuity, or promise thereof, in any form whatsoever, with respect to the furnishing, procurement, reservation, sale, or resale, of any ticket covering any passenger transportation or the use of any passenger accommodation. A payment of the lawful charges of a common carrier subject to this Act to a person acting for or employed by such common carrier shall not constitute a violation of this subparagraph. Any person who violates the provisions of this subparagraph shall be punished by a fine of not more than $1,000 or imprisoned for a term of not more than one year, or both.